Forest Practices Code Penalties and Environmental Damage

Special Report

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Introduction

Over the last two-and-one-half years, the Board has become concerned about the occasional failure of government officials to give adequate weight to environmental damage when setting penalties for Forest Practices Code contraventions.

Forestry officials are experienced at calculating the value of timber, and they are generally efficient at calculating timber values that have been affected by contraventions. However, in some cases, officials have not given full consideration to the environmental and other non-timber values affected.

The Board monitors penalty decisions by receiving public concerns, scrutinizing all review panel decisions and receiving copies of certain district manager decisions. The Board then has the opportunity to appeal district manager decisions to a civil servant "review panel" or to appeal review panel decisions to the independent Forest Appeals Commission (FAC).[1]

The Board recently appealed a number of penalty decisions where it appeared that environmental and other values had not been given adequate consideration. These cases have helped to clarify the appropriate principles and considerations to be applied when levying Code penalties.

This special report has been prepared pursuant to section 189(3) of the *Forest Practices Code of British Columbia Act* (Code Act) to summarize the Board's initiatives regarding this issue.

Excessive harvesting in a riparian area

In late 1999, the Board concluded the first case on this issue. A district manager in northern BC had fined a company almost $13,000 for excessive harvest across 7.2 hectares of riparian management area along two streams. The silviculture prescriptions called for approximately 25 percent tree retention, but actual retention was only 5 per cent for one cutblock, and 8.8 percent in the other.

The district manager had based his $13,000 penalty solely on removing the economic benefit that the company had derived from the contravention. He stated that there was no evidence that the riparian area was damaged or impaired.

When the licensee sought a review of the district manager's decision, the review panel upheld the finding of contravention, but reduced the penalty to zero. The review panel agreed there had been no environmental damage and also concluded that the company had received little or no economic benefit from the contravention.

The Board appealed the review decision, questioning the conclusion that there had been no environmental damage. The silviculture prescriptions called for a substantial amount of tree

[1] For more information on the Board's role in reviewing and appealing decisions see the Board's website www.fpb.gov.bc.ca under "Review and Appeal."

retention along the small fish streams in order to protect riparian values. Leaving significantly fewer trees than prescribed likely had environmental impacts.

The Board also questioned the review panel's conclusion that the trespass and harvesting in the riparian management area did not economically benefit the company, because the volume could have been taken elsewhere in the volume-based tenure. Obviously not all tree volumes are equal. In many cases, it may be economically beneficial to take more profitable trees close to established roads, rather than the more inaccessible trees that have been legally authorized for harvest.

The Board was concerned about the precedent that could be set by a decision that there is not generally economic benefit in a volume-based tenure when wood is improperly taken. Such a precedent could have had significant ramifications on future trespass and riparian management cases.

The Board's appeal to the FAC was successful in restoring the original penalty and clarifying that such penalties should reflect both economic and non-economic factors.

Clear-cutting a wetland riparian area

The second case involved a mountain pine beetle salvage timber harvest near Takla Lake, east of New Hazelton. The silviculture prescription restricted harvest in the riparian zones next to a large wetland. Contrary to this requirement, the company clear-cut an area of 2.15 hectares in the riparian zones.

The trees that were cut represented virtually all the remaining mature timber along the perimeter of the 20-hectare wetland. The trees provided significant habitat for a variety of wildlife, and helped maintain the microclimate and wind cover of the wetland. The unauthorized harvest likely had a significant impact on the biodiversity of the wetland. The harvest reduced wildlife use of the wetland and likely had an incremental impact on the surrounding area's wildlife population.

The district manager fined the company a total of $39,200 for clear-cutting the area.[2] The licensee appealed the fine to a review panel.

The review panel referred the determination back to the district manager, along with instructions that a fine of only $8,000 would be appropriate (for the 2.15 hectare area). In making its decision, the panel stated:

- the penalty should remove only a portion of the economic benefit the licensee derived from the contravention; and
- there should be no penalty for damage to environmental values.

[2] The area included an additional .67 hectares that was excluded from later proceedings.

In fact, instead of imposing a fine to reflect environmental damage, the panel concluded that effects on riparian values were minimal and used that conclusion to justify the penalty being reduced to only one-third of the profit that the licensee had made from the contravention.

The Board appealed the review panel decision, asking the FAC to direct the district manager to remove all the economic benefit that the licensee derived from the contravention and to set a penalty that took into account the impact on the environment.

The FAC directed the district manager to issue a penalty that removed the licensee's profit from the unauthorized harvesting. The FAC ruled that "...in most if not all cases" the entire profit derived from a contravention should be removed. The FAC agreed with the Board that the review panel had been wrong to use its conclusion of minimal environmental impact to justify reducing the amount of profit recovered.

On the issue of considering environmental damage, the FAC ruled that "...there is no indication that the review panel contemplated the impact of the unauthorized harvest on the environment." Therefore, the FAC directed the district manager to specifically consider the ecological impact of the contravention in determining the penalty.

After reconsideration by the district manager and a review panel, a new fine was set at $35,919.38. This amount was approximately four times the original review panel stipulation. The new penalty included approximately $10,000 as compensation to the Crown, $15,000 to remove all economic benefit and $10,000 for environmental damage.

The licensee is currently appealing the increase in penalty.

Failure to install proper stream crossings

In a case near Thutade Lake in the northern interior, the district manager decided that a mining company had contravened their logging plan when clearing a power line by:

- using heavy machinery to cross streams without installing the required crossing structures (two culverts and one bridge);
- operating machinery in the no-machinery zone; and
- failing to remove debris from the riparian area.

Three creeks near a guide-outfitter's lodge were affected, including the creek that supplied the lodge's summer drinking water. The lodge owner observed that there had been substantial siltation of his water supply.

Acknowledging that a penalty of $50,000 was the maximum for such contraventions, the district manager decided not to levy a financial penalty at all against the licensee. Instead, he issued a remediation order that basically required the licensee to do what it was already obligated to do under the logging plan i.e., clean debris out of the creeks and plant grass seed and willow to prevent soil erosion.

The Board argued that a zero penalty may be appropriate for minor, unintentional contraventions that cause minimal harm. However, the lack of any penalty was inappropriate in

the circumstances of this case. The Board cited evidence that the contravention affected human drinking water, created a potential health risk and released substantial sediment into fish streams.

The Board was concerned that the lack of penalty would send the wrong message to those in the field who make the decisions about whether Forest Practices Code rules will be respected. The Board was concerned that the decision could create an incentive for future licensees to ignore Code requirements in cases where such requirements would cost the licensee money or were inconvenient.

As the Board requested, the review panel decided to send the matter back to the district manager to reconsider the lack of penalty. Among other things, the review panel directed him to consider:

- the magnitude of the contravention and the fact that there was impact on a domestic water source and fish streams;
- evidence from the Ministry of Water, Land and Air Protection regarding environmental impacts; and
- that the inability to quantify environmental impact doesn't automatically mean that no penalty should be imposed, as the district manager had implied.

After the review hearing, but before the district manager's new decision, the company gave the lodge owner $23,000 to pay for the new water line he had installed. The district manager considered this payment, along with the specific consideration of environmental impacts and other factors directed by the review panel, and decided not to impose a penalty.

In light of the company's intervening payment for moving the water line, the Board decided not to proceed further with the case.

Landslide affects fish habitat, timber and public expenditures

An Arrow Lakes licensee failed to clean debris out of a creek on a steep hillside, as required by its silviculture prescription. This contravention of section 67(1) of the Code Act triggered a three kilometre-long landslide, which scoured several hectares. The landslide caused:

- road damage;
- damage to fish habitat, through the large deposit of landslide debris into a fish stream containing Kokanee and threatened bull trout; and
- extensive damage to timber along the 30-metre wide landslide path.

The fine imposed was $19,894, which reflected the immediate cost to government of doing initial repairs to the road. However, the penalty did not reflect any amount for damage to fish habitat or damage to timber.

In addition, the penalty did not reflect the fact that after the initial repairs, government proceeded to upgrade the repaired stream culvert to a larger concrete bridge culvert at an additional cost. The penalty did not cover the cost of additional rip rapping that still needed to be done around the new culvert.

The focus of the Board's appeal was that environmental harm and damage to crown resources (timber and riparian forest values) must be explicitly considered, when setting a penalty. Although the penalty may not reflect, dollar for dollar, the damage to Crown resources, such damage to these resources must at least be considered when setting a penalty.

In this case, the damage to public assets was clearly not limited to the damage done to the road. The initial road repair bill was clearly not the full and final measure of that damage. Yet, the district manager apparently did not consider impacts to timber and fish habitat.

In addition, the Board submitted that the district manager should have at least considered what portion of the bill for the new bridge culvert was necessitated by the slide.

The Board asked that the case be referred back to the district manager, with directions to reconsider the penalty amount and to appropriately consider:

- the impacts on fish habitat and the environment;
- the value of timber destroyed; and
- the portion of the cost of the new culvert that could be reasonably be attributed to the contravention.

In response, the review panel sent the case back to the district manager for reconsideration of the penalty. The panel directed the district manager to consider the factors urged by the Board.

Upon reconsideration the district manager doubled the penalty, increasing it to $38,776. In the new decision, he specifically considered the commercial value of the timber that had been damaged, the environmental value of the damaged riparian forest and the public's cost to provide additional guarding and rip rapping around the culvert. He did not require the licensee to pay for the new culvert, as this would have been required to ensure safe fish passage in the normal course of events.

Stumpage credits to compensate for landslide repair

A licensee in the Robson Valley Forest District failed to carry out its road deactivation prescription which called for installation of water-bars and cross ditches. The failure to install the bars and cross-ditches contributed to the creation of a landslide that occurred when two culverts were blocked and water was diverted over the road.

The slide washed out sections of the road for approximately 500 metres and 4,000 cubic metres of silty sand was eroded from the road, ditch-line and cut-slope. Most of this slide material was deposited over a one-hectare bench-land area, to a depth of 0.3 metre. The bench-land was above a creek and some siltation of the creek occurred. After the slide, the licensee repaired the road.

The district manager found the licensee in contravention of four Code provisions,[3] and imposed a fine of $80,000. The district manager noted that damage to the road had cost the licensee $70,000 to repair, but that the licensee had been given a stumpage credit for that amount.[4] (In fact, it was later determined that the licensee had only recovered about $44,000 of its repair costs through the stumpage credit.) The district manager's penalty was designed to recapture the amount of the credit.

When the licensee appealed, the review panel upheld the two key contraventions,[5] but reduced the fine from $80,000 to $5,000.

The district manager had focused on the stumpage credit that the licensee had received for conducting the necessary repair work. Concluding that it was not appropriate for the Crown to pay for the road repairs, he imposed a penalty that recaptured this credit.

However, the review panel discounted the importance of the stumpage credit. The panel concluded that the Crown itself was not out any money for the road repairs, because the stumpage credit allowance given to the licensee was, in effect, paid for by other licensees.

On the other key issue, the review panel reversed the district manager's conclusion that there was a serious effect on environment and forest (road) resources. The review panel minimized the loss to environmental and forest resources, stating that "...there is no compelling evidence that the event was consequential."

The Board appealed the review panel's decision, arguing that the licensee received a stumpage credit for repairing its own mistake should have been reflected in the penalty, under section 117(4)(b) of the Code Act.

As a result, the FAC raised the penalty from $5,000 to $55,157. The penalty recaptured the $44,157 stumpage credit that the licensee had actually realized. The FAC found that the credit was an "...economic benefit derived...from the contravention" which should be considered under section 117(4)(b) of the Code.

The penalty also recaptured the $1,000 economic benefit the licensee had obtained through not properly deactivating the road.

Finally, the FAC imposed a $10,000 penalty as a deterrent and to recognize the gravity and magnitude of the contravention's impact upon the road, the loss of trees, decreased soil productivity, loss of moose forage and short term impacts on fish habitat.

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[3] Section 64(1)(b) of the Code Act (Must deactivate in accordance with the *Forest Road Regulation*); section 64(2) of the Code Act (Must maintain prescribed deactivation provisions); section 20(c) of the *Forest Road Regulation* (Must construct water bars and cross ditches, in accordance with a deactivation prescription); and section 20(d) of the *Forest Road Regulation* (Must inspect, commensurate with risk). The district manager levied $50,000 for contravening s. 64(1)(b); $20,000 for section 64(2); and $10,000 for the *Forest Road Regulation* breaches.

[4] As an "appraisal cost allowance" credit against stumpage fees that would otherwise be payable by the licensee, for a subsequent cutting permit.

[5] Sections 64(1)(b) and 20 (c) -- the failure to construct water bars and cross ditches according to the prescription.

Conclusions

Through these cases, review panels and the Forest Appeals Commission have affirmed the obligation of decision-makers to seriously consider environmental impacts when setting Code penalty amounts.

These decisions have clarified that penalties should reflect both the loss of economic and non-economic public resource values as a result of Code infractions. This means that riparian habitat values, as well as land productivity for commercial timber and other vegetation and wildlife need to be considered. Establishing the degree of impact on water quality and fish habitat becomes important as well. The Crown should be compensated for destruction of all types of public resources, even those without traditional market value.

In addition, these decisions are consistent in removing all economic benefits resulting from a licensee's Code contravention. They also serve to recover any costs incurred by the Crown in repairing damage. The Board finds that these decisions together provide clear and consistent guidance to those assessing penalties under the Code.

It is hoped that the results of these cases will:

- Provide encouragement to district managers to take a broad look at all relevant values damaged by a contravention, rather than focusing only on timber values.

- Encourage government officials to gather information about damage done to the environment and other non-timber values when they first arrive at the scene of a contravention. (In a number of cases the lack of early evidence has hampered the quantification of this type of damage.)

- Demonstrate that the Code system can protect the broad range of public assets that are found in British Columbia's forests.

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